

(1978) 03 BOM CK 0043
In the Bombay High Court
Case No : Spl. C. A. No. 2487 of 1973

Madhukar Yeshwant Patankar and others	APPELLANT
Vs	
Savlaram Gotiram and others	RESPONDENT

Date of Decision : 01-03-1978

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 29, 31, 32, 32(1B), 34

Citation : (1978) MhLj 844

Hon'ble Judges : M.N. Chandurkar, J

Bench : Single Bench

Advocate : K.M. Chopda for B.S. Deshmukh, for the Appellant; R. M. Purandare, For respondent Nos. 1-A and 1-C, for the Respondent

Final Decision : Allowed

Judgement

M.N. Chandurkar, J.—The only question which arises in this petition filed on behalf of the landholders is whether an application u/s 32(1B) of the Bombay Tenancy and Agricultural Lands Act, 1948 (hereinafter referred maintainable.

2. Field survey Nos. 88, 89 and 90 of village Tryarabac in Nasik Taluka admittedly were originally cultivated by one Savlaram Gotiram and according to the landholder,, the possession was taken by him after the" end of the agricultural year 1954-55 while, according to the claimants the fields were cultivated by the original tenant during the agricultural year 1955-56. The original tenant died in 1959. Neither the original tenant during his lifetime nor the present respondents who are his heirs took any proceedings for being restored to possession of the fields in question until after the Tenancy Act came to be amended and a new provision was added in section 32 as sub-section (1B) by Act No. 49 of 1969 which came into force on 17th October 1969. It was only after section 32(1B) became operative that the Tahsildar started suo motu proceedings in July 1971 in the exercise of his powers u/s 32(1B) of the Tenancy Act. The Tahsildar held that the deceased tenant was in possession of the field on 15th June 1955 which was the appointed day. Admittedly the tenant was dispossessed prior to 1st April

1957 and the fields had not been transferred by the landholders or were not converted to non-agricultural use at any time and, therefore, since the respondents" had expressed their willingness to have the suit lands back and undertook to cultivate personally and further they did not hold any other land as tenant or as owner, an order directing restoration of possession to the respondents was passed. In appeal filed against this order, two main questions were agitated on behalf of the petitioner. One was that the Revenue records showed the cultivation of the deceased Savlaram only up to the year 1954-55 and that in 1955-56 personal cultivation by the landlord was recorded and secondly it was contended before him that the heirs of the original tenant had no right to make such a claim for possession after a period of 12 years had elapsed. The Deputy Collector found that the ingredients of section 32(IB) were satisfied and the appeal came to be dismissed. In revision application before the Maharashtra Revenue Tribunal, the same points were reagitated and the Tribunal found that the present petitioner No. 1 admitted that the tenant was in possession in the year 1955-56 and that the petitioners had also admitted that fact. With regard to the right of the heirs of the deceased tenant, it was held that section 32(IB) does not prohibit restoration of possession of the land to the ex-tenant or his legal heirs even if subsequent to their dispossession by the landlord otherwise than by an order of the Tahsildar they ceased to be agriculturists. The application of the petitioners thus came to be dismissed by the Tribunal. The landlords have now filed this petition in which the same two contentions are now raised.

3. However, with regard to the first contention that the deceased tenant had not cultivated the fields during the agricultural year 1955-56, it is difficult to accept the arguments advanced on behalf of the landholders by M r. Chopda that the entry in the Revenue records should be accepted in preference to the oral evidence of the landlords themselves. As already pointed out, petitioner No. 1 had clearly admitted that in the year 1955-56 the deceased tenant was in cultivation. With that admission it is difficult to see how it is now open to the petitioners to contend that the fields were not cultivated by the tenant in 1955-56 and that they lost possession at the end of the agricultural year 1954-55. The finding that the deceased tenant was in possession on 15th June 1955 cannot be disturbed in these proceedings.

4. It is then contended on behalf of the petitioners that the right created by section 32(1B) of the Tenancy Act cannot be availed of by the heirs of the deceased tenant because section 32 (IB) provides that the land should be restored to the tenant. On the other hand, it is contended by Mr. Purandare appearing on behalf of the respondents that the rights of the statutory tenants under the Tenancy Act are expressly made heritable by section 40 of the Tenancy Act and in view of the express provisions of section 40, the right which is created by section 32(IB) can be availed of by the legal representatives of the deceased tenant also.

5. Section 32(IB) provides as follows :?

"Where a tenant who was in possession on the appointed day and who on account of his being dispossessed before the 1st day of April 1957 otherwise than in the manner and by an order of the Tahsildar as provided in section 29, is not in possession of the land on the said date and the land is in the possession of the landlord or his successor-in-interest on the 31st day of July 1969") and the land is not put to a non-agricultural use on or before the last mentioned date, then, the Tahsildar shall, notwithstanding anything contained in the said section 29, either suo motu or on the application of the tenant, hold an inquiry and direct that such land shall be taken from the possession of the landlord or, as the case may be, his successor-in-interest. and shall be restored to the tenant; and thereafter, the provisions of this section and section 32A to 32R (both inclusive) shall, in so far as they may be applicable, apply thereto, subject to the modification that the tenant shall be deemed to have purchased the land on the date on which the land is restored to him :

Provided that, the tenant shall be entitled to restoration of the land under this subsection only if he undertakes to cultivate the land personally and of so much thereof as together with the other land held by him as owner or tenant shall not exceed the ceiling area.

Explanation;?In this Sub-section, "Successor-in-interest" means a person who acquires the interest by testamentary disposition or devolution on death".

The appointed day referred to in the above provision is 15th June 1955. There are several conditions to be satisfied before an order for restoration of land is made by the Tahsildar u/s 32(IB). Firstly the tenant must have been in possession on 15th June 1955, secondly he must have been dispossessed before 1st April 1957 otherwise than in the manner and by an order of the Tahsildar as provided in section 29, thirdly, he must not have been in possession on 1st April 1957, fourthly the land must be in possession of the landlord or his successor-in-interest on the 31st day of July 1969 and fifthly the land must not have been put to a non-agricultural use on or before the 31st day of July 1969. It is only when all these conditions are satisfied that the Tahsildar is entitled to exercise his power of restoring possession of the land to the tenant. A further condition has been provided in the proviso, namely that the tenant must undertake to cultivate the land personally and the tenant will be entitled to be restored to possession only of so much area as will not result in the land held by him, whether as owner or tenant, to exceed the ceiling area.

6. The only question which is material for the purposes of the present petition is whether a reference to the tenant in section 32(IB) will include even his heirs or whether this is a right given personally to the tenant and it is the tenant alone who will be entitled to restoration of possession. It is in this context that section 40 of the Tenancy Act becomes relevant. Section 40 reads as follows: ?

40. "(1) Where a tenant (other than a permanent tenant) dies, the landlord shall

be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death, to such heir or heirs of the deceased tenant as may be willing to continue the tenancy."

Sub-section (2) of section 40 is not relevant for the purpose of this case. Section 40 refers to the death of the tenant and it then provides that in the case of death of the tenant, the landlord shall be deemed to have continued the tenancy on the same terms and conditions on which such tenant was holding it at the time of his death. Section 40, as it is presently worded, therefore, creates a fiction which comes into operation the moment a tenant dies and the effect of the fiction introduced in section 40 is that irrespective of the volition of the landlord, he is deemed to have continued the tenancy. The object of section 40 obviously is that the rights of a statutory tenant which are personal rights and which would otherwise have come to an end on the death of the tenant are made heritable and the tenancy is deemed to have been continued. In other words, a continued relationship of a landlord and tenant is created irrespective of the death of the tenant and after the death of the tenant, the tenancy is inherited by the heir. The tenancy is inherited by only such heir as may be willing to continue the tenancy. One of the important features of section 40 is that it operates in respect of a tenancy which a tenant was holding at the time of his death. Section 40 does not, therefore, operate in any other case except where a tenant was holding the tenancy at the time of his death. In other words, it is only where there is a subsisting tenancy at the time of the death of a tenant that provision is made by section 40 for the devolution of the tenancy rights on such heir or heirs as may be willing to continue the tenancy. Care is, therefore, taken by section 40 to provide that there is a continued relationship of a landlord and tenant between the landlord and the heir of the deceased tenant as the rights of the statutory tenant would otherwise have come to an end by his death. Therefore, before a person can claim rights on account of the deeming fiction which is introduced in section 40, he will have to satisfy the Court that the tenancy he is seeking to inherit was a subsisting tenancy and that the deceased tenant was holding the tenancy at the time of his death. The scope of the enquiry, therefore, in a case where the heirs seek to be restored to possession under the special provisions of section 32(IB) of the Tenancy Act will have to be whether the tenancy was a subsisting tenancy at the time of the death of a tenant. So far as the tenant himself is concerned, if he is alive at the date when proceedings u/s 32(IB) are taken, whether suo motu or at the instance of the tenant himself, the provisions of section 40 will not become relevant at all. The right to be restored to possession given to the tenant u/s 32(IB) is given irrespective of the fact that the limitation provided by section 29 to be restored to possession has elapsed. Now, admittedly the provisions of section 32(IB) have themselves come into operation more than 12 years after the 1st day of April 1957, absence of possession on which day is material before section 32(1B) begins to operate. Therefore, even under the general law of the land, if a tenant was not entitled to be restored to possession by virtue of the passage of the period of 12 years,

unless there are compelling reasons in section 32 (IB) to deprive the landholder of the rights which might have accrued to him by the law of limitation, it may not be possible to enlarge the scope of section 32(IB) of the Tenancy Act beyond what was intended by the Legislature.

7. On the finding recorded in this case- the tenant was dispossessed at the end of the agricultural year 1955-56. During the lifetime of the tenant he had allowed his right to obtain possession to become barred because he had failed to apply within the period of two years prescribed by section 29. He died in 1959. The question is whether if section 40 operates at the point of time when the tenant dies, there was a subsisting tenancy in 1959 or at the time when the provisions of section 32(IB) became operative. If the Legislature intended to give the rights of restoration of possession not only to the tenant, but also his heirs and legal representatives, nothing could have been more easy than making an express provision to that effect in section 32(IB) of the Tenancy Act. It is important to remember that where land was sought to be reached if it was in the possession of a stranger, the provisions of section 32(IB) have been made to operate even in respect of the successor-in-interest of the landlord. There could not have been much difficulty, therefore, if a similar provision could have been made even in the case of a tenant if the right to be restored to possession after more than 12 years was to be given even to the legal representatives.

8. Section 32(IB) does not refer to any restoration of tenancy. It merely refers to a restoration of possession and all that has been done by the provision is that after the possession is restored, the provisions of sections 32A to 32R become operative. However, unless it is possible to hold that the tenancy was treated as subsisting by the Legislature, it will not be possible for the heirs to invoke the provisions of section 40 of the Tenancy Act and there is no indication in section 32(IB) of the Tenancy Act that right up to the date of making the order or on the day on which section 32(IB) was inserted, the tenancy was to be treated as having been subsisting. It is, therefore, not possible for me to hold that an heir of a tenant who was not in a position to show that the tenancy was subsisting is still entitled to invoke the provisions of section 32(1B) of the Tenancy Act.

9. Mr. Purandare has heavily relied on certain observations of the Full Bench in *Vasani Hcriba Londhe v Jagannath Ramchandra Kulkarni* 1969 Mh. L J 249 = 71 Bom. L R 12, and certain observations of Deshpande J. in *Nemchand Chunnilal Gujar and others v. Bhimrao Anna Patti and others* Special Civil Application No. 1719 of 1966 decided on 23rd February 1968, The question which fell for consideration before the Full Bench in *Vasant Londhe's* case was, what was the nature of the rights which vested in a landlord when he took possession on the ground of personal cultivation u/s 31 of the Tenancy Act in the light of the provisions of section 37 of the Tenancy Act which provided for a restoration of possession in case the landlord had failed to cultivate the land personally. In that case an application u/s 37 for restoration of possession was made by the son of the deceased tenant on the ground that the landlord who had acquired the land

for personal cultivation had ceased to cultivate it personally. One of the arguments was that the applicant had no right to apply u/s 37 because he was not a tenant in as much as the original tenant being merely a statutory tenant, his right qua tenant was a personal right which could not be inherited by and passed on to the applicant. It was in that context that the provisions of section 40 were considered by the Full Bench and the Full Bench took the view that on the landlord exercising the right to take possession for his personal cultivation, the tenancy was not terminated but pro tanto suspended or held in abeyance and, therefore section 40 of the Tenancy Act automatically conferred on the applicant, who was the heir of the deceased tenant, the tenancy of the land on the same terms and conditions as were applicable to the latter. It was held by the Full Bench in that case that though section 34 or the new section 31 of the Bombay Tenancy and Agricultural Lands Act, 1948, spoke of termination of tenancy, there was in fact no immediate termination of tenancy in the sense of cessation of the relationship of landlord and tenant and that until 12 years of the landlord's personal cultivation have elapsed, the so-called termination was merely conditional and provisional. It was pointed out that the termination was provisional because until the expiry of such cultivation by the landlord, the tenant's right to be restored to possession on the same terms and conditions continued and till then, though the tenant has lost possession, his right to take land back on the same terms and conditions survived and to that extent, the termination of the tenancy was conditional and provisional. The decision of the Full Bench will thus make it clear that the heir was held entitled to possession because the termination of tenancy was held to be provisional and that was why section 40 was held to operate in that case.

10. Mr. Justice Deshpande's decision is earlier in point of time, but the same view was taken by him in the context of section 37, Deshpande J. took the view that as a result of an order passed in the proceedings u/s 34 read with section 29 of the Tenancy Act, the Tenancy of the tenant cannot be said to have been put an end to completely but must be deemed to have been suspended at least for 12 years as contemplated u/s 37 of the Act. He further took the view :

"Given though such tenant was not in possession of the land and his possession was lost on apparent termination of his tenancy, his tenancy rights were still kept dormant or, to put it differently, the said rights were merely suspended and were capable of being revived during the period or" 12 years on any day whenever the landlord committed a breach of his representation and ceased to cultivate the land personally. Notwithstanding this suspension of his tenancy rights, it must follow that he was still holding the tenancy rights in the said land till his rights were not extinguished therein till the passage of 12 years during which time his tenancy rights were kept dormant, and suspended by virtue of sections 34, 39 and 37 of the Act."

The basis of Deshpande J.'s decision was that the tenancy rights subsisted, though in a dormant state, and were, therefore, capable of being inherited by

virtue of section 40 of the Tenancy Act. The question of tenancy rights being suspended or being dormant does not arise where section 32(IB) is concerned. Admittedly it is a provision made to give benefit to a tenant who has been dispossessed. A new right is, therefore, created superseding the limited right which was given u/s 29. There was no occasion for the operation of section 40 in the case of the death of the tenant who was already dispossessed and had even lost his right to recover possession during his lifetime. After the expiry of the period of two years from the date of dispossession there was no remedy open to the tenant and if he had died after that period, it is difficult to see what right could be inherited by the tenant fictionally. In my view, the Revenue authorities were clearly in error in invoking the provisions of section 40 in order to give relief to the heirs of the deceased tenant.

11. The orders of the Revenue authorities are, therefore, liable to be quashed. The petition is thus allowed. The impugned orders are quashed. However, there will be no order as to costs.